89-565

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the Second Circuit correct in ruling that once a labor dispute has been classified as being a "minor dispute" under the Railway Labor Act, and thus subject to the exclusive jurisdiction of adjustment boards under Section 3 of that Act, rail labor may never utilize the Act's major dispute resolution process to resolve that labor dispute, even after an adjustment board rules that the carrier's claimed contractual justification was without merit?

2. If this Court does not summarily reverse the Second Circuit's decision in this case, but instead sets this case for briefing and argument, rail labor submits that the following issue should also be considered along with the primary issue:

> When the district court finds that a carrier has an obligation to bargain with rail labor over notices served under Section 6 of the Railway Labor Act demanding the negotiation of agreements to deal with the impact of a sale of rail lines on employees (thereby triggering the Act's status quo obligation), does a claim by the carrier that it has the contractual right to affect employees during the Act's bargaining process by abolishing their jobs, raise a dispute over the interpretation of the Railway Labor Act's status quo obligation within the exclusive jurisdiction of federal courts, or a dispute committed by Section 3 of the Railway Labor Act to the exclusive jurisdiction of adjustment boards?

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Petitioners United Transportation Union [hereinafter, "UTU"], eleven (11) other labor organizations, and twenty-six (26) union officials[1] [hereinafter collectively, "rail labor"] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that Court which was entered on June 7, 1989, in *CSX Transportation, Inc. v. UTU, et al.*, 879 F.2d 990, and summarily reverse that judgment as being inconsistent with this Court's recent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Assoc.*, 491 U.S. —— (1989).

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[1] Petitioners are listed on Appendix I which is attached to this petition and reproduced in the separately bound Appendix; R.W. Earley, who was an appellant below, is no longer participating in this case due to an agreement which Mr. Earley's Committee reached with respondent.

OPINIONS BELOW

The decision of the Second Circuit is reported at 879 F.2d 990 and is reproduced in the separately bound appendix [hereinafter, "App."] at 1a-31a. The decision of the United States District Court for the Western District of New York, which was affirmed by the Second Circuit, is reproduced in the Appendix at 32a-62a and is reported at 688 F. Supp. 98.[2]

JURISDICTION

The judgment of the Court of Appeals (App. at 71a) was entered on June 7, 1989, and on June 22, 1989, petitioners filed an untimely petition for rehearing which was denied by the appellate court on August 29, 1989. App. at 73a. On August 30, 1989, and then on October 2, 1989 Justice Thurgood Marshall granted petitioners extensions of time in which to file this petition to and including October 6, 1989. Sup. Ct. No. A-169, *UTU, et al. v. CSX Transportation, Inc.* This petition is timely under 28 U.S.C. § 2101(c) and seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

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[2] On November 3, 1987, the district court dismissed a complaint by two union officers, including Mr. Earley (*see*, note 1, *supra*) in *Decker v. CSX Transportation, Inc.*, W.D.N.Y. Civil Action No. 87-1147C, which was subsequently consolidated with the suit by respondent against all of its unions and their counterclaim against respondent. *Decker* was initially dismissed because the court concluded that the unions' efforts to enforce the Railway Labor Act constituted an impermissible collateral attack on an order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] exempting the rail line sale from regulation under 49 U.S.C. § 10901. The decision accompanying that order is reported at 672 F. Supp. 674. Mr. Decker and Mr. Earley asked the district court to reconsider its ruling and on May 26, 1988, the court vacated its prior order, concluding that the labor statute could be enforced without interfering with the Commission's permissive order. App. at 51a-53a. Since respondent did not challenge that ruling (*see*, App. at 8a n.3), the vacated ruling has not been reproduced in this already voluminous appendix.

STATUTES INVOLVED

This case involves rail labor's suit to enforce the bargaining and status quo obligations of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and respondent CSX Transportation, Inc.'s [hereinafter, "CSXT"] defense that the underlying controversy was a "minor dispute" under that labor statute over which the district court had no jurisdiction and over which rail labor could not strike. Sections 2 First, 3 First(i), (m), (p) and (q), 3 Second, 5 First, 6 and 7 First of the Railway Labor Act (45 U.S.C. §§ 152 First, 153 First(i), (m), (p) and (q), 153 Second, 155 First, 156 and 157 First) are relevant and have been reproduced in the Appendix at 99a-106a.

STATEMENT OF THE CASE

For the past several years, rail labor has been embroiled in what seems to be an endless dispute with our nation's railroads over whether rail labor can rely upon Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to require the railroads to bargain over the impact of rail line sales on employees *before* the carriers sell their rail lines and adversely affect their employees' seniority and other contractual rights. This case arose out of that dispute and began in 1987 when several rail unions on respondent CSXT, a carrier which operates a rail system of over 20,000 miles in the Eastern half of this Country, asked that carrier to bargain over the impact which a proposed sale of a 369 mile rail line by CSXT between Buffalo, New York and Eidenau, Pennsylvania, would have on the employees' seniority and other contractual rights. Before this case was decided by the district court, all of the petitioning labor organizations had filed comparable notices on CSXT under Section 6 of the Railway Labor Act to bargain for agreements to apply to the sale.[3]

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[3] Many of those notices were served prior to April 1, 1988, but after respondent CSXT raised as one of its defenses to bargaining

CSXT, however, refused to bargain over those notices, asserting in particular that the sale of its rail line was within the exclusive jurisdiction of the ICC and, therefore, any effort to enforce the Railway Labor Act's bargaining commands would be an impermissible collateral attack on the ICC's jurisdiction. D.A. at 860.

A. District Court Proceedings

After two subordinate units of petitioner UTU and their officers brought a suit against respondent in the Supreme Court for the State of New York (which respondent removed to the United States District Court for the Western District of New York) to enforce the Railway Labor Act's bargaining and statuts quo obligations, respondent brought a separate action against petitioners on October 29, 1987, in that federal court, seeking declaratory and injunctive relief. According to CSXT, rail labor had no right under the labor statute to require CSXT to bargain over the sale "because the ICC has exclusive jurisdiction over this transaction" and because the decision to sell a rail line is a "matter solely within [CSXT's] management prerogative." D.A. at 27-29. Besides asking the court to declare CSXT's rights as stated above, respondent also asked the court to enjoin rail labor from striking CSXT "in an effort to block or interfere with the sale or compel CSXT to agree to conditions not required by the ICC . . . ." D.A. at 30.

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over those notices, the claim that rail labor had waived the right to serve Section 6 notices by entering into agreements which barred such notices until April 1, 1988, rail labor served new notices on CSXT after April 1, 1988, to eliminate that argument. App. at 54a n.10. Those post-April, 1988 notices were served after the initial sale agreement had terminated and before the replacement agreement was signed at closing. Deferred Appendix in 2d Cir. No. 88-7461 [hereinafter, "D.A."] at 245-47.

Petitioners counterclaimed against respondent to enforce the Railway Labor Act's bargaining and status quo obligations and asked the court to enjoin CSXT from selling its rail line before it had complied fully with those statutory obligations. D.A. at 45.

In late March 1988, while this litigation was pending, CSXT posted notices that it would sell the Buffalo-Eidenau line on April 6, 1988, and that all of the employees who were working on that line—over 200 employees—would have their jobs abolished effective 11:59 p.m. on April 5, 1988. App. at 42a. CSXT, however, did not sell on April 6, for the district court ordered the carrier to maintain the status quo while it conducted a hearing on, and considered the cross-motions of the parties for injunctive relief. App. at 43a.

At that hearing, and in its request for a strike injunction, CSXT asserted that it had the "unilateral right," derived from its agreements with rail labor [4] and from its past practice,[5] to dispose of its rail lines without bargaining with rail labor. D.A. at 861. Since rail labor disputed that right, CSXT asserted, the controversy over its ability to sell during the Act's bargaining process was a "minor" dispute within the exclusive jurisdiction of the adjustment boards established under Section 3 of the Railway Labor Act, 45 U.S.C. § 153.

On May 26, 1988, the district court issued its decision concluding that CSXT was correct in asserting that the dispute between it and rail labor over whether it could sell its rail lines without first bargaining was a "minor"

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[4] That "right," CSXT asserted, came from the "Reduction-In-Force" provisions of its agreements that required a certain number of days notice before it abolished jobs. App. at 57a.

[5] That past practice consisted of various abandonments and ten sales of lines where, according to CSXT, rail labor had not insisted on bargaining. Rail labor, however, disputed CSXT's assertion that it had "acquiesced" to this "practice." App. at 58a-60a.

dispute subject to the exclusive jurisdiction of the adjustment boards.[6] According to the court (App. at 55a):

> The dispute between CSXT and its employees, in very basic terms, comes down to whether the carrier has the unilateral right to sell one of its less profitable line operations, and thereby abolish all CSXT positions on that line, without bargaining with the unions about protections for its employees who will be affected by that sale.

That dispute, the court concluded, should be classified as "minor," for CSXT had presented a "plausible interpretation" of the agreements that would support its claim of a contractual "right to sell the Buffalo-Eidenau line." App. at 58a.

Since the dispute was classified as a minor dispute, CSXT was permitted to proceed with the sale,[7] and rail labor was permanently enjoined from striking to prevent or otherwise to interfere with the sale. However, the court recognized the validity of the post-April 1, 1988 Section 6 notices (see, note 3, *supra*) and it ruled that "[w]hile CSXT can proceed with the sale of the line, CSXT is ordered to bargain with Defendant unions, consistent with the requirements of the Railway Labor Act, over notices served pursuant to Section 6 . . . on or after April 1, 1988, in connection with the sale of the Buffalo-Eidenau Line." App. at 65a-66a. CSXT did not appeal from that bargaining order.

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[6] The court also concluded, however, that CSXT was incorrect in asserting that the ICC's jurisdiction over rail line sales operated to relieve it of its obligations under the labor statute to bargain over rail labor's Section 6 notices. App. at 53a.

[7] The district court, however, entered a temporary stay of the sale pending appeal (App. at 70a), and the Second Circuit continued that stay. However, after the appeal was argued on July 18, 1988, the appellate court vacated that stay and CSXT consummated the sale at the end of that day. App. at 8a.

B. Appeal And Adjustment Board Ruling

Petitioners appealed from that injunction and judgment to the Second Circuit and, while that appeal was pending, submitted, along with CSXT, the dispute identified by the district court to a Special Board of Adjustment established pursuant to Section 3 Second of the Railway Labor Act, 45 U.S.C. § 153 Second. On December 15, 1988, while the appeal was pending decision by the appellate court, the adjustment board issued its award concluding that there was "nothing in the written agreements that gives [CSXT] the right to consummate a line sale without first bargaining under the Railway Labor Act." App. at 92a.[8] The Board also concluded that CSXT was incorrect in asserting that the past practices upon which it had relied had "attained contractual status enabling [CSXT] to sell the Buffalo-Eidenau Line without negotiating the effects of such a sale on affected employees." *Id.* In short, the Board concluded that the agreements neither authorized nor prohibited CSXT from disposing of its rail lines, but rather, were silent on this point.

After the adjustment board issued its award, petitioners asked the appellate court to vacate the strike injunction and to remand this case to the district court for consideration of rail labor's counterclaim to enforce the Railway Labor Act's bargaining and status quo commands. According to rail labor, the adjustment board's award made it unnecessary to consider whether the district court had properly classified the dispute as being a minor dispute. That motion was considered by the court of appeals along with the merits of rail labor's appeal, and on June 7, 1989, the court issued its decision which

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[8] CSXT has since challenged that award, asserting that the board decided an issue which the parties had not asked it to decide. *CSXT v. UTU, et al.*, W.D.N.Y. Civil Action No. 88-1404C. That suit is currently pending before the district court.

affirmed the district court's classification ruling and strike injunction, and denied rail labor's motion to vacate.

After concluding that the district court had properly classified the underlying dispute between rail labor and CSXT as being "minor" and within the exclusive jurisdiction of the adjustment boards (App. at 15a-25a), the appellate court addressed rail labor's motion to vacate the strike injunction because of the adjustment board's award. Rail labor's motion was denied, for the appellate court disagreed with petitioners' underlying premise, "believing that [petitioners'] contention rests upon a fundamental misconception of the RLA process for the resolution of major and minor disputes." App. at 26a.

According to the appellate court, once a dispute has been classified as being "minor," it is committed *forever* to the exclusive jurisdiction of the adjustment boards, and rail labor must look to that forum alone for whatever relief it might seek. App. at 28a-31a. Consequently, since the board had considered the dispute, the district court's directive that CSXT bargain over the post-April 1, 1988 Section 6 notices was "presumably moot" (App. at 22a), and there was no basis for a remand to the district court for consideration of rail labor's counterclaim to enforce the Railway Labor Act's *major* dispute resolution processes. App. at 29a-30a. As the court stated: "The district court concluded . . . , as we have, that the controversy is a minor dispute. The Board's arbitral determination does nothing to alter that conclusion, and indeed is in no way directed to that question." *Id.* Thus, the appellate court ordered that the strike injunction remain in place and instructed rail labor to look solely to the adjustment board process to obtain whatever relief might be appropriate in this case. App. at 30a-31a.

On June 22, 1989, petitioners asked the court of appeals to rehear its decision denying rail labor's motion to vacate, relying upon the recent decision of this Court in *Consolidated Rail Corp. v. Railway Labor Executives'*

Assoc., 491 U.S. —— (1989), which had been issued on June 19, 1989. In that decision, this court explained that the classification of a dispute as being minor, does not preclude "bargaining" for all time; rather, in a case where the board subsequently rejects the carrier's claim of a contractual right to change working conditions, such as occurred here, that classification decision merely delays bargaining "until the arbitration process is exhausted." Slip op. at 11. On August 29, 1989, the appellate court denied the petition for rehearing and the accompanying suggestion for rehearing *en banc*. App. at 73a. This petition has followed.

REASONS FOR GRANTING THE WRIT

This petition brings before this Court a question which is crucial to the orderly administration of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, but which should not exist because this Court addressed this very issue in *Consolidated Rail Corp. v. Railway Labor Executives' Assoc.* [hereinafter, *"Conrail"*], 491 U.S. —— (1989), and reached a result with which the Second Circuit's decision conflicts. Since this Court has so recently rejected the Second Circuit's conclusion that once a rail labor dispute is classified as being a "minor" dispute, it remains a minor dispute forever, there is no need for this Court to have this issue briefed and argued; rather, petitioners' submit, the proper disposition should be for this Court to grant the writ, summarily reverse the judgment of the Second Circuit, and remand this case to that Court for reconsideration in light of *Conrail*.[9]

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[9] Petitioners respectfully submit that if this Court grants the writ, but does not summarily reverse the Second Circuit's ruling, this Court should also consider the question of whether the lower courts properly characterized as being a minor dispute a controversy over what working conditions Sections 5 First and 6 of the Railway Labor Act, 45 U.S.C. § 155 First and § 156, required be maintained during the Act's bargaining processes. This issue is worthy of review by this Court because the lower courts' ruling on

I. This Petition Presents An Issue—The Proper Relationship Between Major And Minor Disputes—That Is Crucial To The Orderly Administration Of The Railway Labor Act's Dispute Resolution Processes

Congress has long been concerned that labor disputes in the rail industry not reach the level that rail transportation is interrupted, and since 1926, Congress has sought to achieve this goal of uninterrupted rail service by relying upon a statutory scheme—the Railway Labor Act—that fosters collective bargaining as the means to resolve labor disputes. This statutory scheme does not *ban* self-help by either party to resolve disputes over *changes* to existing rates of pay, rules, or working conditions, but rather, *bars* the use of self-help until after the parties have exhausted the Act's bargaining processes, which can include mediation and a presidential emergency board that is to investigate and report on the dispute. *E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Indeed, this bar on the premature use of self-help by either side is "central" to the design of the Act's scheme for the peaceful resolution of disputes over changes to existing agreements, including disputes over the formation of new agreements—*i.e.*, "major disputes." *Conrail*, slip op. at 3-4; *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S.

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this point is in conflict with the decisions of this Court in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.*, 491 U.S. —— (1989), and *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), where the Court viewed as being an issue of statutory interpretation, and not contract interpretation, the issue of what working conditions must be preserved during the Act's bargaining processes. Moreover, this issue has been in dispute for decades, *compare, Rutland Ry. v. BLE*, 307 F.2d 21, 44 n.11 (2d Cir. 1962) (Marshall, J., dissenting), *cert. denied*, 372 U.S. 954 (1963), *with, Chicago & North Western Transportation Co. v. Railway Labor Executives' Assoc.*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S.Ct. 493 (1988), and in view of the diametrically different positions on this question (*see*, Brief for United States at 26-27, *Pittsburgh & Lake Erie R.R., supra*), will continue to recur until resolved by this Court.

142, 150 (1969). Congress has expressly provided that the parties cannot be compelled to arbitrate such disputes. 45 U.S.C. § 157 First.

Disputes over changes to existing agreements, however, are not the only type of dispute which can arise over rates of pay, rules and working conditions, for disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. § 153 First(i)) can also result in labor strife if allowed to remain unresolved. Since 1934, however, Congress has required that this type of labor dispute—*i.e.*, a "minor dispute"—be resolved by compulsory arbitration before an adjustment board, if unresolved by "conferences." *Conrail*, slip op. at 4-5. Unlike major disputes, though, there is no "general statutory obligation on the part of an employer to maintain the status quo pending" resolution of the minor dispute before an adjustment board. *Conrail*, slip op. at 5. Moreover, adjustment boards have exclusive jurisdiction over minor disputes which are unresolved by conferences. *Id.*

This difference in the methods to resolve major and minor disputes, and in particular the inapplicability of the status quo requirement to carrier actions taken in reliance on a disputed interpretation of contract in a minor dispute, has led the parties in many instances to classify disputes by looking to the results to be achieved by their label, and not by examining the underlying nature of the controversy. Moreover, petitioners respectfully submit, the fact that adjustment boards have exclusive jurisdiction over minor disputes has led some courts to classify disputes concerning changes as being minor disputes, because of a misdirected predisposition either to reduce their case loads or to prevent possible strikes.

Last term, this Court recognized the need for it to address this classification problem and it "articulated [in *Conrail*] an explicit standard for differentiating between

major and minor disputes" under the Railway Labor Act. Slip op. at 3. However, petitioners respectfully submit, the fact that this Court has now articulated such a standard does not detract from the importance of a proper understanding of the relationship between major and minor disputes, nor does it lessen the need for this Court to assure that the lower federal courts adhere to the teachings of this Court on that relationship. Indeed, if the Act is to function as Congress has intended, it is crucial that the lower courts not relegate to the exclusive jurisdiction of the adjustment boards disputes which Congress has provided are to be resolved by bargaining and *then*, if still unresolved after being subject to the Act's major dispute resolution process, by self-help.

Unfortunately, the Second Circuit, even after this Court's decision in *Conrail* was brought to its attention, refused to rehear its conclusion that adjustment boards, once a dispute was found to involve an issue of contract interpretation, were expected to resolve *all* aspects of the dispute, including those that were outside of the narrow jurisdiction which Congress has given those boards. Whether or not adjustment boards retain jurisdiction over disputes once they perform their narrow statutory duties and resolve the contract interpretation issue, is a question that clearly is important to the proper functioning of the Act's dispute resolution processes.

Moreover, in view of this Court's rejection of the "hybrid dispute" concept in *Conrail*, slip op. at 8-12, the proper understanding of what is to occur once an adjustment board rejects a carrier's claim that it has the contractual right to make a change, is crucial to the entire rail industry. This is especially true in cases, such as that involved here and in other line sale cases, where the disputed change is *neither authorized nor provided by* the existing contract. Railroads must understand the consequences of their actions in changing those working conditions based on a claimed contractual right which even

they recognize is not likely to prevail before an adjustment board. Indeed, the only way that this long-standing dispute over line-sales will be resolved, short of congressional involvement, is by collective bargaining. But, until the unecrtainty that currently exists over labor's right to bargain is resolved, the industry will look to the courts to frustrate that bargaining. The Second Circuit's decision, by relegating rail labor to a dispute resolution forum that has no jurisdiction to create the needed agreements, and by affirming the permanent strike injunction, has effectively nullified the district court's unappealed bargaining order and, thus, has given CSXT and other railroads a strong incentive to refuse to negotiate a solution to the line sale dispute.

II. The Second Circuit's Decision Requiring Petitioners To Look To The Adjustment Boards For Relief From CSXT's Violations Of The Railway Labor Act's Bargaining And Status Quo Commands Is In Direct Conflict With This Court's Decision In *Conrail*

In most rail labor cases involving claims by employees under Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, that a carrier has changed working conditions in a manner that is not prescribed either in the agreement or in Section 6 of the Railwal Labor Act, and a carrier defends on the grounds that its actions are justified by the agreement, an adjustment board will be able to give complete relief regardless of whether it accepts or rejects the carrier's defense. This, however, will be true *only* if the disputed change, which is found by the board to be unauthorized, *violates* an agreement.

However, as this Court has recognized in *Conrail*, slip op. at 10 n.7, and in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.*, 491 U.S. —— (1989), slip op. at 13-14 n.15 and accompanying text, not all rail working conditions are established by express or implied agreements. Rather, there exists in the railroad industry a substantial area of conduct which has been "satisfac-

torily tolerable to both sides, [and, thus,] . . . omitted from the agreement[s]. . . ." *Detroit & Toledo Shore Line*, 396 U.S. at 155. When this type of non-agreement working condition is at the heart of the dispute, an adjustment board cannot grant the employees any relief if the board determines that the carrier's claim of contractual right is without merit. This is so for essentially two reasons. First, adjustment boards can only interpret existing contracts; they cannot create new ones. *E.g.*, *Hearings on H.R. 7650 Before House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. at 64 (1934) (Statement of Commissioner Joseph B. Eastman). And second, in such a situation, if there is a violation of an employee-right to be remedied, it will be a violation of the Railway Labor Act's status quo obligation; adjustment boards do not have jurisdiction to interpret or to enforce that statutory command. *E.g.*, *Air Cargo Inc. v. IBT*, 733 F.2d 241, 246-47 (2d Cir. 1984).

Also, adjustment boards lack the ability to grant make-whole relief to employees who are injured when a carrier changes rules or working conditions in violation of Section 2 Seventh of the Act, but *not* in violation of the agreement itself. Again, since adjustment boards cannot create or modify agreements, those boards cannot remedy a *change* in agreements that is not also a *breach* of that contract. And again, any injury to the employees would result from a *violation of statute—i.e.*, Section 2 Seventh—which adjustment boards have no jurisdiction to enforce.

In ruling that petitioners must look solely to the Special Board of Adjustment for relief in this case, the Second Circuit failed to recognize that no employee-contractual right has been violated in this case. Rather, the rights which have been violated are rights created by statute; but, those rights cannot be considered or remedied by the adjustment boards.

In this case, the district court found that CSXT's actions in selling the Buffalo-Eidenau line would change the

seniority rights of the employees, for, as the Court stated (App. at 44a):

> [W]hile the work which CSXT employees are currently performing on the Buffalo-Eidenau line will remain in existence when the line is sold, current employees who enjoy contractual seniority rights to that work will not be able to exercise those rights once the line is sold, and the work transferred to the B&P.

That *change* in seniority rights, however, did not *violate* the agreements for, as the adjustment board noted, CSXT was "not precluded, by agreement or otherwise, from *selling its assets* pursuant to ICC approval." App. at 88a (emphasis in original). But as the adjustment board also concluded, neither was CSXT authorized by its collective bargaining agreements, either express or implied, to sell its assets. Thus, whether or not CSXT violated Section 2 Seventh of the labor statute when it sold its rail line, presents a question over which the adjustment board has no jurisdiction to address or to remedy.

Also, in this case rail labor's Section 6 notices triggered the Act's status quo obligation and, thus, CSXT was obligated by the labor statute "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo Shore Line*, 396 U.S. at 153 (footnote omitted). Since performing operations for CSXT over the Buffalo-Eidenau line was part of the actual, objective working conditions of the employees, and was involved in or related to the dispute raised by rail labor's Section 6 notices, CSXT could not change that practice by selling unless rail labor had waived bargaining. *Pittsburgh & Lake Erie R.R.*, slip op. at 16-17; *Detroit & Toledo Shore Line*, 396 U.S. at 154. Thus, once the adjustment board rejected CSXT's claim of a contractual right to sell with-

out bargaining, whatever justification the lower courts had to decline to exercise jurisdiction over this dispute (and we submit there was no such justification) disappeared, for only federal courts have jurisdiction to consider and remedy a violation of the Act's status quo obligation.

Several days after the Second Circuit issued its decision, this Court issued its ruling in *Conrail* and in that decision addressed this very issue. Rail labor had argued in *Conrail* that there was a class of disputes over rates of pay, rules or working conditions, which it called a "hybrid dispute," that did not fit either the major or minor category. That type of dispute, rail labor asserted, involved cases where the carrier makes a change in working conditions and then defends against a "Section 2 Seventh suit" by asserting that it had the contractual right to make the change. Brief for Respondent at 34-35, *Conrail*. In such a case, rail labor contended, the adjustment board had jurisdiction to consider the carrier's contractual defense, but the railroad must forego unilateral implementation of the change until the board has reached its decision. *Conrail*, slip op. at 9.

This Court rejected that argument because, it concluded, rail labor's "approach unduly constrains the freedom of unions and employers to contract for discretion." *Conrail*, slip op. at 9. But in rejecting rail labor's "hybrid dispute" theory, this Court stated that the "effect of this ruling . . . will be to delay collective bargaining in some cases until the arbitration process is exhausted." Slip op. at 11. As this Court added (*id.* at 11-12; emphasis added):

> Full utilization of the [Adjustment] Board's procedures . . . will diminish the risk of interruptions in commerce. Failure of the "virtually endless" process of negotiation and mediation established by the RLA for major disputes, . . . frees the parties to employ a broad range of economic selfhelp, which may dis-

> turb transportation services throughout the industry, and unsettle employer-employee relationships. . . . *Delaying the onset of that process until the Board determines on the merits that the employer's interpretation of the agreement is incorrect* will assure that the risks of selfhelp are not needlessly undertaken . . . .

Although the import of that ruling is self-evident, Justice White's concurring opinion in *Conrail* is more explicit and directly on point to this case: "If the Board decides that the company is wrong about its authority under the contract, the result will be that the company has sought a change in the contract without invoking the procedures applicable to major disputes."

This view of the relationships between the major and minor disputes resolution processes, and between federal court and adjustment board jurisdictions, as not being mutually exclusive, is consistent with this Court's earlier decision in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567-68 (1946). In *Pitney*, this Court concluded that a court *adjudicating* a claimed violation of Section 2 Seventh,[10] where the meaning of the contract has been placed in dispute, "should exercise equitable discretion to give that agency [*i.e.*, an adjustment board] the first opportunity to pass on the issue." 326 U.S. at 567. And as the court stated (326 U.S. at 568; footnote omitted):

> The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly

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[10] *Pitney* involved a district court sitting as a railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976) (repealed), which was acting in two roles: one, as a "carrier" supervising the trustee in administering the estate (325 U.S. at 565), and the other as an adjudicator with jurisdiction to enforce Section 2 Seventh. 326 U.S. at 565-66. This Court affirmed the lower court's actions as the trustee's supervisor, but not as an adjudicator. 326 U.S. at 567-68.

> revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.

See, Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247 (1913), which this Court cited in support of the above quoted statement.

In short, this Court has clearly stated in *Conrail* that the classification of a dispute as being a minor dispute does not, for all time, commit the entire controversy to the exclusive jurisdiction of the adjustment boards as the Second Circuit held. Rather, the adjustment board has exclusive jurisdiction to decide *only* the contract interpretation issue, and once that issue is decided adversely to the carrier, the Act's bargaining process becomes enforceable by the courts, or by the methods set forth in the Act for major disputes.

Since the Second Circuit refused to rehear its decision in light of *Conrail*, this Court should grant this petition, summarily reverse the Second Circuit and remand for further consideration in light of *Conrail*.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that the writ be granted, the judgment of the Second Circuit be reversed summarily, and this case be remanded to that court for further consideration in light of this Court's decision in *Conrail*.

Respectfully submitted,

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Date: October 6, 1989

APPENDIX

APPENDIX

APPENDIX I

LIST OF PETITIONERS

United Transportation Union [UTU], F.A. Hardin (President, UTU), and J.A. Cianciotti (General Chairman, UTU (E));

UTU, Yardmasters Department [RYA], B.R. Carver (Assistant to President, RYA), and Richard P. DeGenova (General Chairman, UTU (RYA));

American Train Dispatchers Association [ATDA], R.J. Irvin (President, ATDA), and D.W. Branham (General Chairman, ATDA);

Brotherhood of Maintenance of Way Employes [BMWE], G.N. Zeh (President, BMWE), and B.J. Twigg (Executive Board, BMWE);

Transportation • Communications International Union [TCU] (formerly Brotherhood of Railway, Airline and Steamship Clerks [BRAC]), R.I. Kilroy (International President, TCU), Dwight D. Vance (General Chairman, C&O System Board, BRAC), and L.H. Tackett (General Chairman, B&O System Board, BRAC);

Brotherhood of Locomotive Engineers [BLE], L.D. McFather (President, BLE), and J.A. LeClair (General Chairman, B&O Committee);

TCU, Carmen Division [Carmen], W. Fairchild (President, Carmen), and M.L. Crawford (General Chairman, B&O Carmen);

International Association of Machinists and Aerospace Workers [IAM], J.F. Peterpaul (Vice President, IAM), A.J. Sarcone (General Chairman, IAM District 22), and W.D. Snell (Assistant President/Directing General Chairman, IAM District 22);

International Brotherhood of Firemen and Oilers [IBF&O], J.L. Walker (International President, IBF&O), and D.S. Anderson (General Chairman, System Council No. 6, IBF&O);

Sheetmetal Workers International Association [SMWIA], A.R. Hicks (General Chairman, SMWIA), and D.C. Buchanan (Dir. Railroad Workers, SMWIA);

International Brotherhood of Electrical Workers [IBEW], E.P. McEntee (International Vice President, IBEW), and George L. Laitile (General Chairman, IBEW); and

Brotherhood of Railroad Signalmen [BRS], V.M. Speakman, Jr. (President, BRS), and C.T. Green (General Chairman, B&O System Committee, BRS).